92-641

Supreme Court, U.S.
FILED
OCT 13 1992
OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1992

LEONARD NOBELMAN AND HARRIET NOBELMAN,

Petitioners,

vs.

AMERICAN SAVINGS BANK,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

May debtors in a Chapter 13 bankruptcy case use 11 U.S.C. Section 506(a) to reduce the secured claim upon their residence to fair market value and treat the balance as an unsecured claim without violation of 11 U.S.C. Section 1322(b)(2)?

LIST OF ALL PARTIES TO THE PROCEEDINGS

Petitioners and Appellants below:

Leonard Nobelman and wife, Harriet Nobelman (misspelled "Nobleman" in Court of Appeals)

Respondent and Appellee below:

Tim N. Truman, Standing Chapter 13 Trustee for the Northern District of Texas

American Savings Bank:

Parent: If any, unknown

Non-wholly owned subsidiaries: If any, unknown

Murray Mortgage Company:

Parent: If any, unknown

Non-wholly owned subsidiaries: If any, unknown

REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS BY OTHER COURTS

Case Below:

Matter of Nobleman, 968 F.2d 483 (5th Cir. 1992)

Re Nobelman, 129 B.R. 98 (D.C. N.D. Tex. 1991)

STATEMENT OF THE GROUNDS UPON WHICH JURISDICTION OF THE SUPREME COURT IS BASED

Judgment of the Court of Appeals below was entered August 13, 1992.

Petition for Certiorari is sought within 90 days of entry of Final Judgment by Court of Appeals giving jurisdiction under 28 U.S.C. Section 1254(2) and Supreme Court Rule 13.1.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE

Article II, Section 8, Constitution of the United States:

> (The Congress shall have Power) "To establish a uniform Rule of Naturalization and uniform Laws on the subject of Bankruptcies throughout the United States."

Title 11, U.S.C. Section 103(a):

> "Except as provided in section 1161 of this title, Chapters 1, 3, and 5 of this title apply in a case under Chapters 7, 11, 12, or 13 of this title."

Title 11, U.S.C. 506(a):

"An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest."

Title 11, U.S.C. Section 1322(b)(2):

(b) "Subject to subsections (a) and (c) of this section, the plan may –

(2) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims."

STATEMENT OF THE FACTS OF THE CASE

The Nobelmans' residence is a condominium with a fair market value of $23,500, although secured by a lien in the total amount of $71,335.04. In their Chapter 13 Plan of

Debt Adjustment, the Nobelmans propose to value down the secured claim to the fair market value and treat the balance as an unsecured claim under a technique commonly called "lien splitting." That effort thus far has been denied by all courts below.

BASIS OF JURISDICTION IN THE COURT OF APPEALS

Petitioners presented a Final Order of the District Court affirming a Final Order of the Bankruptcy Judge, giving the Court of Appeals jurisdiction under 28 U.S.C. Section 158(d).

ARGUMENT ON REASONS FOR GRANTING WRIT OF CERTIORARI

1. CONFLICT AMONG CIRCUITS.

The Court of Appeals for the Fifth Circuit, in its opinion, acknowledges that its opinion is in conflict with four other circuit court opinions, specifically, *Bellamy v. Federal Home Loan Mortgage Co.*, 962 F.2d 176 (2nd Cir. 1992); *In re Hart*, 923 F.2d 1410 (10th Cir. 1991); *Wilson v. Commonwealth Mortgage Corp.*, 895 F.2d 123 (3rd Cir. 1990); and *In re Hougland*, 886 F.2d 1182 (9th Cir. 1989). See *Matter of Nobleman*, 968 F.2d 483, 486 (5th Cir. 1992).

The Nobelman opinion also conflicts with the Third Circuit opinion in *Sapos v. Provident Inst. of Savings*, 967 F.2d 918 (3rd Cir. 1992), which it does not mention.

2. IMPORTANT QUESTION OF A UNITED STATES COURT OF APPEALS WHICH SHOULD BE SETTLED BY THIS COURT.

Article I, Section 8, of the U.S. Constitution requires uniform laws on bankruptcy. While the statutes involved read the same, they are not being uniformly applied because of the split in the circuits. At the time this Petition is prepared, a Chapter 13 debtor may split residence liens in four circuits covering 17 states, but may not do so in three states. The remaining six circuits have not yet passed upon the issue.

This Court's recent opinion of *Dewsnup v. Timm*, ___ U.S. ___, 112 S.Ct. 773, 116 L. Ed. 2d 903 (1992), has lead to some confusion in this area, as predicted by the dissent, even though it dealt with a Chapter 7 liquidation and stated it was to be restricted to its facts. In the Chapter 13 arena, the opinion below found support in *Dewsnup, Matter of Nobleman*, 968 F.2d 483, 487 (5th Cir. 1992), while the Second and Third Circuits found *Dewsnup* inapplicable to Chapter 13 cases. *Bellamy v. Federal Home Loan Mortgage Co.*, 962 F.2d 176, (2nd Cir. 1992); *Sapos v. Provident Inst. of Savings*, 967 F.2d 918 (3rd Cir. 1992).

It would be very helpful to bankruptcy administration for a clarification of the extent, if any, to which the teachings of *Dewsnup* should be applied in Chapter 13.

See, for example, Professor Margaret Howard, *Norton Bankr. Law Advisor*, (1992-3) (Mar. 1992) p.3, *Dew-What?*

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APPENDIX

1. Opinion of Court of Appeals for the Fifth Circuit sought to be reviewed, *Matter of Nobleman*, 968 F.2d 483 (5th Cir. 1992).....App. 1

2. *In re Nobelman*, 129 B.R. 98 (N.D. Tex. 1991)..... App. 16

3. *In re Nobelman*, 390-35116-HCA-13 (B.C. N.D. Tex. 1991) (unreported)..... App. 32

In the Matter of Leonard NOBLEMAN and Harriet Nobleman, Debtors.

Leonard NOBLEMAN and Harriet Nobleman, Appellants,

v.

AMERICAN SAVINGS BANK and Tim Truman, Standing Chapter 13 Trustee, Appellees.

No. 91-1796.

United States Court of Appeals, Fifth Circuit.

Aug. 13, 1992.

Philip Palmer, Jr., Dallas, Tex., for debtors, appellants Leonard and Harriet Nobleman.

Terre M. Vardaman, Jackson, Miss., for amicus curiae Harold J. Barkley.

Michael J. Schroeder, David M. Odens, Settle & Pou, Dallas, Tex., for appellee American Sav. Bank.

Charles Kennon, Fort Worth, Tex., for appellee Tim Truman.

Dean Cooper, Assoc. Gen. Counsel, FHLMC, McLean, Va., for amicus curiae Federal Home Loan Mortg. Corp.

Michael L. Riddle, Dallas, Tex., for amicus curiae Mortg. Bankers Ass'n of America.

Appeal from the United States District Court For the Northern District of Texas.

Before BROWN, GARWOOD and EMILIO M. GARZA, Circuit Judges.

EMILIO M. GARZA, Circuit Judge:

The United States Bankruptcy Court for the Northern District of Texas denied confirmation of the Chapter 13 reorganization plan proposed by Leonard and Harriet Nobleman, in which the Noblemans attempted to bifurcate a mortgage lien claim on their principal residence into secured and unsecured claims. The United States District Court for the Northern District of Texas affirmed the decision of the bankruptcy court. *See* 129 B.R. 98 (N.D.Tex.1991). The Noblemans appeal, and, finding that the use of 11 U.S.C. § 506[1] to bifurcate this claim would impermissibly modify the rights of American Savings Bank under 11 U.S.C. § 1322(b)(2).[2] we affirm the order of the district court.

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[1] Section 506(a) of Title 11 provides:

> An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff . . . and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim.

[2] Section 1322(b)(2) of Title 11 provides that the Chapter 13 plan may:

> modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims.

I

The facts of this case are uncontested. The Noblemans executed a note in the amount of $68,250.00, payable to American Savings Bank (American), and secured by a deed of trust on their principal residence – a condominium in a complex in Dallas, Texas.[3] Six years later, the Noblemans filed a voluntary petition for relief under Chapter 13 of the bankruptcy code. American filed its proof of claim for $71,265.04 – which was later amended to $71,335.04. The Noblemans then filed an initial and modified Chapter 13 Plan of Reorganization. The plan valued the Noblemans' residence at $23,500.00. The Noblemans also filed a motion for valuation pursuant to 11 U.S.C. § 506 along with certain modifications to their plan. At the confirmation hearing, Mr. Nobleman testified as to the value of the property; no controverting evidence of its value was offered by any other party.

In their modified plan, the Noblemans proposed to make direct payments to American at the mortgage contract rate only up to the scheduled value of the condominium. The balance of American's claim – $41,257.66 – would be treated as a general unsecured claim under the Plan, payable *pari passu*, though the Noblemans did plan to cure the prepetition arrearages owed to American. The unsecured creditors would receive nothing.

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[3] The deed of trust also provided for a security interest in an undivided .67% interest in the common areas of the condominium complex, escrow funds, proceeds of hazard insurance, and rents.

Both American and the Standing Chapter 13 Trustee objected to the confirmation of the plan on the grounds that, inter alia, the plan purported to alter the lienholders' rights in violation of 11 U.S.C. § 1322(b)(2). The bankruptcy court found that the plan impermissibly proposed to modify American's rights by bifurcating American's claim into secured and unsecured claims in violation of 11 U.S.C. § 1322(b)(2). Accordingly, the bankruptcy court denied confirmation of the Noblemans' modified Chapter 13 plan, and the district court affirmed.[4]

II

The parties and their amici are not in agreement regarding the approach we should take in interpreting the interplay between sections 506(a) and 1322(b)(2) of the bankruptcy code. The Noblemans concede that a debtor may not modify the rights of holders of a secured claim if such security is an interest in real property that is the debtor's principal residence. They assert, however, that section 506(a) defines a secured claim as the value of the collateral, while any balance on the debt above this amount is an unsecured claim. Thus, they contend that, under section 1322(b)(2), the only portion of a claim which cannot be modified is the part supported by the value of the collateral – the secured claim. The part of the

[4] The bankruptcy court's conclusion of law – that the modified plan violated 11 U.S.C. § 1332(b)(2) – is subject to plenary review on appeal. *See In re Delta Towers, Ltd.*, 924 F.2d 74, 76 (5th Cir.1991) (quotations omitted); *In re Allison*, 960 F.2d 481, 483 (5th Cir.1992) (citations omitted).

claim in excess of the value of the collateral becomes an unsecured claim, which can be modified.

One amicus suggests that allowing debtors to bifurcate a mortgage lien claim pursuant to section 506 and allowing a modification pursuant to section 1322(b)(2) results in a systematic and coherent application of the bankruptcy code. It further argues that to prohibit the bifurcation of a claim would ignore that various sections of the bankruptcy code are to be read together.

American, on the other hand, contends that the proposed modification of the Noblemans' Chapter 13 plan is impermissible because it would bifurcate the creditor's claim into secured and unsecured claims. American asserts that bifurcation of a secured claim in real property that is the debtor's principal residence violates section 1322(b)(2) because the plan meaning of section 1322(b)(2) prohibits such a modification. Furthermore, American contends that the general provisions of section 506 must not be read to prevail over the specific provisions of section 1322(b)(2), because the general language of one section should not control matters specifically addressed in another. American also argues that the limited bar regarding modification of the rights of residential lenders was enacted in response to Congressional perceptions that these lenders perform a valuable social purpose by making home loans.

Two other amici agree with American, contending that bifurcating a debtor's secured claim under section 1322(b)(2) is unfair and unworkable because bifurcation: (i) provides a windfall to Chapter 13 debtors; (ii) results in home mortgage lenders receiving worse treatment

under Chapter 13 than other secured creditors; and (iii) does not help promote the bankruptcy code's fresh start objective. Furthermore, the amici argue that the plain meaning of section 1322(b)(2) precludes a debtor from "cramming down"[5] a claim secured only by the debtor's principal residence, and that the rights of holders of secured claims, which include a claim secured only by a security interest in property that is the debtor's principal residence, may not be modified.

III

The foregoing summary of the different positions of the parties and their amici demonstrates that the interplay between sections 506 and 1322(b)(2) of the bankruptcy code is not entirely clear.

A

Four circuit courts have adopted the position advocated by the Noblemans, allowing bifurcation of an undersecured mortgage into a secured portion and an unsecured portion. In *Bellamy v. Federal Home Loan Mortgage*, 962 F.2d 176, 179-180 (2d Cir.1992), the Second Circuit discussed sections 506(a) and 1322(b)(2), and reasoned that a claim must first be analyzed under section 506(a) to determine the part that is fully secured – that is, the amount equal to the market value of the

[5] Cram-down is a term which refers to an attempt by a Chapter 13 debtor to reduce a secured claim to the value of the collateral securing the claim and to discharge the balance as an unsecured claim under the Chapter 13 plan.

property on which the lien is fixed. The balance of the claim owed above the market value is unsecured. *Id.* Bifurcating a claim into secured and unsecured portion does not, for purposes of section 1322(b)(2), modify the creditor's rights, but rather determines how, under the bankruptcy code, the creditor's right to payment must be satisfied. *Id.* at 179-180. The Third, Ninth, and Tenth Circuits have held similarly. *See In re Hart*, 923 F.2d 1410, 1411 (10th Cir.1991) (bifurcation of a home mortgage into secured and unsecured portions based on the fair market value of the property under a threshold application of section 506(a) was a recognition of the legal status of the creditor's interest in the debtors' property and not a modification of the mortgage); *Wilson v. Commonwealth Mortgage Corp.*, 895 F.2d 123, 126-29 (3d Cir.1990) (unsecured portion of creditor's claim may be modified, and anti-modification provision of section 1322(b)(2) does not apply because creditor's claim was secured by personal property as well as by debtor's residence)[6]; *In re Hougland*, 886 F.2d 1182, 1183 (9th Cir.1989) (nothing in section 1322(b)(2) affects the determination under section

[6] In *Sapos v. Provident Inst. of Sav. in the Town of Boston*, 967 F.2d 918, 920 (3d Cir. 1992), the Third Circuit affirmed its holding in *Wilson*, The Third Circuit noted the Supreme Court's holding in *Dewsnup v. Timm*, ___ U.S. ___, 112 S.Ct. 773, 116 L.Ed.2d 903 (1992), and stated that the *Dewsnup* Court's "interpretation of section 506 in a chapter 7 liquidation does not apply in this chapter 13 reorganization." *Id.* at 925. The Third Circuit concluded that "a Chapter 13 debtor with an undersecured debt, whether that debt be secured solely by residential real estate or by realty and personality, may resort to bifurcation under section 506(a). . . ." *Id.* at 928.

506(a) that an undersecured claim can be divided into a secured portion and an unsecured portion).

Bankruptcy courts, including some in this circuit and the First, Sixth, Seventh, Eighth and Eleventh circuits, have adopted the position advocated by American. These courts that have held bifurcation impermissible because such bifurcation would vitiate the purpose of section 1322(b)(2). *See, e.g., In re Chavez,* 117 B.R. 733, 736 (Bankr.S.D.Fla.1990) (in a Chapter 13 case, the allowed amount of a claim secured only by a security interest in a principal residence of a debtor is, at filing, the balance owing on the debt without regard to the value of the collateral, section 506(a) notwithstanding); *In re Kaczmarczyk,* 107 B.R. 200, 202 (Bankr.D.Neb.1989) (section 1322(b)(2) claims should not be bifurcated). In *In re Boullion,* 123 B.R. 549, 551 (Bankr.W.D.Tex.1990), the bankruptcy court discussed the interplay between sections 1322(b)(2) and 506(a), and stated that "in view of *Grubbs' [v. Houston First Am. Sav. Ass'n,* 730 F.2d 236 (5th Cir. 1984) (en banc)] interpretation of the intention of Congress in enacting § 1322(b)(2), applying 11 U.S.C. § 506 to these secured claims would result in a 'modification' in contravention of the clear meaning of the statute." Similarly, in *In re Schum,* 112 B.R. 159, 162 (Bankr.N.D.Tex.1990), the bankruptcy court held that the "proposed modification of the debt would have the effect of treating the real property secured by only a lien on the debtor's principal residence in the same manner as any other property secured by a lien."[7]

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[7] *See also In re Sauber,* 115 B.R. 197 (Bankr.D.Minn.1990). In *Sauber,* the bankruptcy court denied the confirmation of a debtor's Chapter 13 plan that proposed to divide the first mortgage into secured and unsecured portions. *Id.* at 199. The *Sauber* court stated that "[t]he Ninth Circuit, in *Hougland,* takes an overly technocratic approach in analyzing the language of § 1322(b)(2) . . . and in relating § 506(a) to it." *Id.* The *Sauber* court reasoned that by focusing on the terms "secured claim" and "unsecured claim", and by using section 506(a) definitions, the *Hougland* court judicially removed most of the protection that the statute provides. *Id.*

Similarly, in *In re Mitchell,* 125 B.R. 5, 6 (Bankr.D.N.H.1991) the court stated that the specific language of section 1322(b)(2) prevails over the general language of section 506(a). To support this conclusion, the *Mitchell* court noted that if Congress had intended to change the manner in which a claim secured by a debtor's residence would be treated under the bankruptcy code, Congress would have specifically limited section 1322(b)(2) to claims secured pursuant to section 506. *Id.* at 8; *see also In re Etchin,* 128 B.R. 662, 665 (Bankr.W.D.Wis.1991) (bifurcation and partial avoidance of an undersecured home mortgage by a Chapter 13 debtor runs afoul of the specific protection afforded to creditors whose claims are secured only by a debtor's principal residence under § 1322(b)(2)); *In re Bradshaw,* 56 B.R. 742, 747 (S.D.Ohio 1985) (section 1322(b)(2) prevents modification of any loan secured only by a security interest in the debtor's principal residence).

B

The Supreme Court's recent decision in *Dewsnup v. Timm,* ___ U.S. ___, 112 S.Ct. 773, 775, 116 L.Ed.2d 903 (1992), lends support to this view that bifurcation is impermissible. In *Dewsnup,* the Court had to decide whether, under 11 U.S.C. § 506(d) of the bankruptcy code, a debtor could "strip down" a creditor's lien on real property to the value of the collateral, when that value is less than the amount of the claim secured by the lien. The Court held that section "506(d) does not allow petitioner

to 'strip down' respondents' lien, because respondents' claim is secured by a lien and has been fully allowed pursuant to § 502." *Id.*, ___ U.S. at ___, 112 S.Ct. at 778. The Court specifically stated that it took no position on the meaning of the words "allowed secured claim" in other provisions of the bankruptcy code, specifically section 506(a).[8] *Id.*, ___ U.S. at ___, 112 S.Ct. at 778, n. 3. The Court declared that "to grant a debtor the broad new remedy against allowed claims to the extent that they become 'unsecured' for purposes of § 506(a) without the new remedy's being mentioned somewhere in the Code itself or in the annals of Congress is not plausible, in our view, and is contrary to basic bankruptcy principles." *Id.*, ___ U.S. at ___, 112 S.Ct. at 779. The Court reasoned that the creditor's lien stays with the real property until foreclosure because that "is what was bargained for by the mortgagor and the mortgagee." *Id.* ___ U.S. at ___, 112 S.Ct. at 778. "Any increase over the judicially determined valuation during bankruptcy rightly accrues to the benefit of the creditor, not to the benefit of the debtor and not to the benefit of other unsecured creditors whose claims have been allowed. . . . " *Id.*

C

In our analysis, we are cognizant that "[t]he plain meaning of legislation should be conclusive, except in the

[8] *See Patterson v. Shumate*, ___ U.S. ___, ___ 112 S.Ct. 2242, 2251, 119 L.Ed.2d 519 (1992) (Scalia, J., concurring) (noting the one-subsection-at-a-time approach taken by *Dewsnup* Court when interpreting section 506(d) of Title 11 of the bankruptcy code).

'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters.' " *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242, 109 S.Ct. 1026, 1031, 103 L.Ed.2d 290 (1989) (quotation omitted). The words of the statute "are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing. . . . " *Watt v. Alaska*, 451 U.S. 259, 266, n. 9, 101 S.Ct. 1673, 1678, n. 9, 68 L.Ed.2d 80 (1981) (quotation omitted). Section 506(a) of Title 11 provides:

> An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff . . . and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim.

Section 506(a) is a provision of general applicability in cases under Chapter 7, 11, 12 and 13 of the bankruptcy code. *See* 11 U.S.C. § 103(a). Section 1322(b)(2) of Title 11, however, only applies in Chapter 13 cases. *See* 11 U.S.C. § 103(h). Section 1322(b)(2) provides that the Chapter 13 plan may:

> modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims.

Section 1322(b)(2) clearly prohibits the modification of rights of holders of secured claims if the claim is secured only by a security interest in the debtors' principal residence. However, this prohibition set forth in section 1322(b)(2) appears to conflict with section 506(a), which would allow the modification. If two statutes conflict, a generally accepted tenet of statutory construction is that the general language of a statute does not "prevail over matters specifically dealt with in another part of the same enactment." *See In re Russell*, 93 B.R. 703, 705 (D.N.D.1988) (citations omitted); *see also Landmark Land Co. v. Office of Thrift Supervision*, 948 F.2d 910, 912 (5th Cir.1991), *quoting Gozlon-Peretz v. United States*, ___ U.S. ___, 111 S.Ct. 840, 848, 112 L.Ed.2d 919 (1991) (citation omitted) (a specific provision controls over one of more general application); *Mennor v. Fort Hood Nat'l Bank*, 829 F.2d 553, 557 (5th Cir. 1987) ("The general language in a statute such as 42 U.S.C. § 2000e-5(k) may not be interpreted to authorize what is disallowed by the specific language of 28 U.S.C. § 1920"); *D. Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204, 208, 52 S.Ct. 322, 323, 76 L.Ed. 704 (1932) (general language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment). We accordingly hold that the specific language of section 1322(b)(2) prevails over the general language of section 506(a).

Moreover, section 1322(b)(2) describes its subject matter as the modification of "the *rights of holders* of" claims, not as the modification of *claims* as such; thus, the section can properly be read as *excepting* from its reach modification of "*the rights of holders of* . . . a claim secured

only by a security interest in real property that is the debtor's principal residence. . . . " Therefore, even if the entirety of such a claim is not a secured claim (as per section 506(a)), the rights of a holder of such a claim may not be modified under section 1322(b)(2).

D

The legislative history also indicates that Congress intended this result. In *Grubbs v. Houston First Am. Sav. Ass'n*, we discussed section 1332(b)(2)'s legislative history and noted:

> With regard to § 1322(b)(2), the Senate receded from its position that no "modification" was to be permitted of *any* mortgage secured by real estate; it instead agreed to a provision that modification was to be barred *only* as to a claim "secured only by a security interest in real property *that is the debtor's principal residence.*" This limited bar was apparently in response to perception, or in suggestions advanced to the legislative hearings . . . that, home-mortgagor lenders, performing a valuable social service through their loans, needed special protection against modification. . . .

730 F.2d 236, 246 (5th Cir.1984) (en banc) (emphasis supplied in *Grubbs*.)

In *Grubbs* we held that section 1322(b), "construed in the light of its legislative history and of its context within Chapter 13 . . . evinces no legislative intent that a home-mortgagor debtor is barred either (a) from curing a pre-

petition acceleration into maturity of the unpaid installments due upon his home mortgage, or (b) from proposing . . . that all past due or matured amounts secured by his home mortgage be paid during the term of his plan. . . . " *Id.* at 237. Therefore, although our holding in *Grubbs* did not specifically deal with the interplay between section 506(a) and section 1322(b)(2) of Title 11 of the bankruptcy code, we did discuss the legislative history of section 1322(b)(2) and noted the legislative intent not to permit any modification on a claim secured by the debtor's principal residence.

We are persuaded that our analysis of section 506(a) and section 1322(b)(2) is consistent with the legislative history of section 1322(b)(2) of the bankruptcy code – the desire to afford some protection to the home mortgage industry. *See Grubbs*, 730 F.2d at 245-46. As the other courts which have discussed these provisions have noted, the Senate and House versions of section 1322(b)(2) were different. The proposed House version was favorable to debtors, allowing the plan to "modify the rights of holders of secured claims or of holders of unsecured claims. . . . " *See* 3 App. *Collier on Bankruptcy* at III, 537 (15th Ed.1992). The proposed Senate version was favorable to lenders, stating that the plan could "modify the rights of holders of secured claims (other than claims wholly secured by mortgages on real property) or of holders of unsecured claims. . . . " *Id.* at VII, 572-73. Neither the Senate version nor the House version became the final version of section 1322(b)(2) – the final version was characterized by legislative leaders as a "compromise" agreement. *See* Bankruptcy Reform Act of 1978, Pub.L. No. 95-598, 1978 U.S.C.A.N. 5787, 6481, 6550

(statements of Representative Edwards and Senator DeConcini – section 1322(b)(2) of the House amendment represents a compromise agreement between similar provisions in the House bill and Senate amendment). We believe our interpretation of section 506(a) and section 1322(b)(2) reflects this compromise.

Accordingly, we hold that section 1322(b)(2) prohibits confirmation of the Noblemans' Chapter 13 plan. The bifurcation of an undersecured home mortgage runs afoul of the specific protection afforded under section 1322(b)(2) to home mortgage creditors whose claims are secured only by a debtor's principal residence. Section 506(a) cannot be used to bifurcate the claim and vitiate the protection of section 1332(b)(2).

IV

For the foregoing reasons, we AFFIRM.

In re Leonard NOBELMAN and Harriet Nobelman, Debtors.

Leonard NOBELMAN and Harriet Nobelman, Appellants,

v.

AMERICAN SAVINGS BANK and Tim Truman, Trustee, Appellees.

Civ. A. No. 3-91-0753-H.

United States District Court,
N.D. Texas,
Dallas Division.

June 24, 1991.

Rosemary J. Zyne, Dallas, Tex., for debtors.

Michael Schroeder Settle & Pou, Dallas, Tex., for American Sav. Bank.

Charles L. Kennon, III, Ft. Worth, Tex., for Truman.

MEMORANDUM OPINION
AND ORDER

SANDERS, Chief Judge.

This is an appeal from a final order of the United States Bankruptcy Court of the Northern District of Texas, Dallas Division in an action brought under the United States Bankruptcy Code. The Court has jurisdiction over the appeal pursuant to 28 U.S.C. § 158(a).

The present appeal, a matter of first impression in this District, concerns the bankruptcy court's denial of confirmation of a Chapter 13 Plan of Reorganization that

used the provisions of 11 U.S.C. § 506 to bifurcate a mortgage lien claim on the principal residence of Debtors Leonard and Harriet Nobelman into allowed secured and allowed unsecured claims for purposes of treatment under the Plan. The Court concluded that using section 506 to bifurcate the claim impermissibly modified the rights of Appellee, American Savings Bank, N.A. ("ASB"), in violation of 11 U.S.C. § 1322(b)(2).

I. Background.

The facts of this case are uncontested. On June 21, 1984, the Nobelmans executed a note in the amount of $68,250.00 payable to ASB, secured by a deed of trust on their primary residence. Murray Mortgage Company is the servicing agent of ASB. The deed of trust also provides for a security interest in an undivided .67% interest in the common areas of the condominium complex, escrow funds, proceeds of hazard insurance, and rents.

On August 6, 1990, the Nobelmans filed a voluntary petition for relief under Chapter 13 of the Bankruptcy Code. On August 14, 1990, ASB filed its proof of claim for $71,265.04, which was subsequently amended to $71,335.04. ASB's proof of claim provides that ASB's claim is secured only to the extent that its security interest is sufficient to satisfy the full amount of the claim, and that it is unsecured to the extent that it is insufficient.

The Nobelmans filed their Chapter 13 Plan of Reorganization (the "Plan") on August 31, 1990, which was later modified. The Plan values the residence at $23,500.00. The Nobelmans filed a motion for valuation pursuant to 11 U.S.C. § 506 along with the modifications

to their Plan. At confirmation, Leonard Nobelman testified as to the value of the property; no controverting evidence of its value was offered by any other party.

The Plan proposes to make direct payments to ASB at the mortgage contract rate only up to the scheduled value of the collateral. The balance of ASB's claim – $41,257.66 – is treated as a general unsecured claim under the Plan, payable pari passu. The unsecured creditors receive nothing under the Plan. The Nobelmans propose to cure the prepetition arrearages owed to ASB through their Plan.

Both ASB and the Standing Chapter 13 Trustee objected to the confirmation of the Plan on the grounds that, *inter alia*, the Plan purports to alter the lienholders' rights in violation of 11 U.S.C. § 1322(b)(2).

On February 13, 1991 the Bankruptcy Court entered its findings of fact and conclusions of law. The findings of fact are undisputed and are recited above. The bankruptcy court's conclusions of law find that "[t]he Plan impermissibly proposes to modify [ASB's] claim into secured and unsecured claims in violation of § 1322(b)(2)." Findings of Fact and Conclusions of Law entered February 14, 1991, at 3. Accordingly, on March 12, 1991. The bankruptcy court entered its order denying confirmation of the Nobelman's modified Chapter 13 Plan.

On March 21, 1991, the Nobelmans filed their Notice of Appeal.

II. Standard of Review

This Court reviews the bankruptcy court's findings of fact under the clearly erroneous standard, but the bankruptcy court's conclusion of law are subject to de novo review. *See In re Consolidated Bancshares, Inc.*, 785 F.2d 1249, 1252 (5th Cir.1986); *Lawler v. Guild, Hagen & Clark, Ltd. (In re Lawler)*, 106 B.R. 943, 952 (N.D.Tex.1989) [hereinafter *In re Lawler*]. Because the facts of this case are undisputed, the sole subject of review are the bankruptcy court's conclusions of law. De novo review requires the Court to make a judgment independent of the bankruptcy court's, without deference to that court's analysis and conclusions. *See In re Lawler*, 106 B.R. at 952, *citing Moody v. Amoco Oil Co.*, 734 F.2d 1200, 1210 (7th Cir.), *cert. denied*, 469 U.S. 982, 105 S.Ct. 386, 83 L.Ed.2d 321 (1984).

III. Discussion.

The issue before the Court concerns the interplay of two sections of the Bankruptcy Code. Section 1322(b)(2) of the Bankruptcy Code provides that

> a Plan may modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtors' principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims.

Section 506 of the Bankruptcy Code provides that

> an allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under Section 553 of this rule, is a secured claim to the extent of the value of such creditor's interest in the estate.

The issue before the Court is whether the Nobelmans may bifurcate a claim secured only by a lien on their principal residence pursuant to section 506 and then modify the unsecured claim without violating section 1322(b)(2).

The Nobelmans rely heavily on the fact that three Courts of Appeals have addressed this issue and concluded that the type of bifurcation provided in the Nobelmans' Plan is not barred by section 1322(b)(2). For their part, appellees rely on a series of bankruptcy cases from several districts barring the sort of bifurcation contemplated by the Plan. The Court turns first to the cases cited by the Nobelmans.

The Ninth Circuit decided the seminal case that supports the Nobelmans' Plan. In *In re Hougland*, the Ninth Circuit stated that the plain meaning of the terms of the statutes at issue showed that "nothing in section 1322 affects the determination under section 506(a) that an undersecured claim can be divided into a secured portion and an unsecured portion." *Hougland v. Lomas & Nettleton Co. (In re Hougland)*, 886 F.2d 1182, 1183 (9th Cir.1989) [hereinafter *In re Hougland*].

The *Hougland* court started by examining section 506, stating that "it is clear that section 506(a) applies to Chapter 13 proceedings" pursuant to section 103(a), and therefore there is "no reason to believe that the phrases 'secured claim' and 'unsecured claim' in section 1322(b)(2) have any meaning other than those given to them by section 506(a)." *Id.* Accordingly, an undersecured claim has a "secured claim" component and an "unsecured claim" component. *See id.* at 1183-84.

The court then turned to the "other than" clause of section 1322.

> That clause follows the secured claim portion of the sentence and precedes the unsecured claim portion. Certainly it refers to what preceded it, and indicates that a secured residential real estate claim will have special protection. Indeed, if the referent of the 'other than' clause is not the secured claim language that precedes it, what could the referent be? It would be most unusual if it were the unsecured claim language or the whole sentence. That strongly indicates that only the 'secured claim' portion is protected.

Id. at 1184. On the basis of this statutory construction, the *Hougland* court dismissed those courts that found that the "other than" clause refers to both the secured and unsecured portions of the undersecured claim as "beg[ging] the question". *Id.*

In *Wilson v. Commonwealth Mortgage*, the Third Circuit adopted the reasoning and ruling of the Ninth Circuit's *Hougland* decision, and held that "section 1322(b)(2) does not preclude the modification of any 'unsecured' portion of an undersecured claim." *Wilson v. Commonwealth Mortgage Corp.*, 895 F.2d 123, 127 (3rd Cir.1990).

> The statutory construction which some bankruptcy courts have used to support their position that the entire "claim," consisting of both the secured and the unsecured portion of the claim, cannot be modified has been roundly criticized by the Ninth Circuit in *Hougland*. We agree with the Ninth Circuit's view that because the "other than" phrase is best read to refer to secured claims, the "other than" phrase should

> be read to limit modification only of that portion of the claim that is secured.

Id. (citations omitted).

Most recently, the Tenth Circuit Court of Appeals considered this issue in *In re Hart*, and "join[ed] the Third and Ninth Circuits in holding that an undersecured mortgage is, for the purposes of the bankruptcy code, two *claims*, and that only the secured *claim* is protected by section 1322(b)(2)." *Eastland Mortgage Co. v. Hart (In re Hart)*, 923 F.2d 1410, 1415 (10th Cir.1991) [hereinafter *In re Hart*]. Furthermore, the court contended that "while bifurcation, in the literal sense, may be a modification of the *mortgage* represented in the secured and unsecured claims, bifurcation is not, of itself, a 'modification' of the secured claim made impermissible by section 1322(b)(2). Indeed, the act of bifurcation recognizes, but does not affect, the secured claim." *Id.* Accordingly, while recognizing contrary decisions by bankruptcy courts in the Fifth, Eight, Tenth,[1] and Eleventh Circuits, *see id.* at 1414,

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[1] The bankruptcy courts in the Tenth Circuit were split on the issue. *Compare Brouse v. CSB Mortgage Corp. (In re Brouse)*, 110 B.R. 539, 543-44 (Bankr.D.Colo.1990) ("Allowing a debtor to use Section 506(d) to avoid the lien on the unsecured portion of the debtor's principal residence does not negate the Section 1322(b)(2) prohibition of modifying the security interest in real property that is the debtor's principal residence."); *In re Ross*, 107 B.R. 759, 762 (Bankr.W.D.Okla.1989) (finding that the court had previously "erred in holding that § 1322(b)(2) prohibited a determination under § 506(a) as to the extent to which a claim is secured and unsecured"); *and In re Simmons*, 78 B.R. 300, 303 (Bankr.D.Kan.1987) (holding that § 1322(b)(2) does not prohibit bifurcation of an undersecured claim into secured and unsecured claims and that "[t]he cases that hold otherwise

the Tenth Circuit found that "nothing in the plain language of section 1322(b)(2) . . . instructs us to go beyond the Code's statutory definition of the term 'secured claims' to protect the unsecured portion of an undersecured home mortgage." *Id.* at 1415.

In contrast to the Third, Ninth, and Tenth Circuits, numerous bankruptcy courts have found that section 1322(b)(2) prohibit the type of bifurcation contemplated by the Nobelmans' Plan. In *In re Sauber*, the bankruptcy court for the District of Minnesota squarely confronted the Third Circuit's analysis in *Hougland*.

> The Ninth Circuit, in *Hougland*, takes an overly technocratic approach in both analyzing the language of § 1322(b)(2) and (b)(5), and in relating § 506(a) to it. Although ostensibly undertaken in search of the plain meaning of these statutes, that meaning, and the proper setting of the statutes in the context of the overall scheme of the Code, is as clearly missed as the proverbial forest might be missed in examining the trees.

In re Sauber, 115 B.R. 197, 199 (Bankr.D.Minn.1990).

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blindly focus on the ['other than'] clause of § 1322(b)(2)") *with First Interstate Bank of Oklahoma, N.A. v. Woodall (In re Woodall)*, 123 B.R. 95, 98 (Bankr.W.D.Okla.1990) [hereinafter *In re Woodall*] (stating that "using § 506(a) to bifurcate would make the intent of § 1322(b)(2) a nullity, and the Court believes that Congress enacted § 1322(b)(2) for a purpose") *and In re Christiansen*, 121 B.R. 63, 64 (Bankr.D.Colo.1990) (relying on the reasoning of *In re Sauber*, 115 B.R. 197 (Bankr.D.Minn.1990) in holding that § 1322 bars bifurcation of claims secured only by the debtor's residence).

The *Sauber* court argued that "what the *Hougland* court did not seem to appreciate, is that we are dealing with general and specific concepts that are intended to apply to, and govern, the rights of debtors and their creditors in different situations, and with different applications, depending on the particular Code purposes to be served." *Id.* In *In re Sauber,* the court found it plain that Congress provided certain home mortgagees with protection against modification of their rights which might otherwise result from the application of section 506 in Chapter 13 cases. The court found that "[t]he clearly focused concern [of section 1322(b)(2)] is with the rights of *holders* of residential real estate mortgages" and that *Hougland* judicially removed most of that statute by its use of section 506(a) definitions.

The Court finds the analysis presented by the Ninth Circuit in *Hougland* to be strained and unconvincing. To begin with, the *Hougland* court simply assumed that because section 506(a) may be applied to Chapter 13 proceedings pursuant to section 103(a), every undersecured claim in a Chapter 13 proceeding is automatically transformed into a secured and unsecured claim. This assumption is the foundation upon which the entire *Hougland* decision rests, and it is flawed for at least two reasons.

First, under the Third Circuit's analysis the general provision of section 506 controls the more specific provisions of section 1322(b)(2), whereas "[t]he specific provisions found in Chapter 13 *must* be accepted as controlling over the general provisions of Chapters 1, 3, and 5 which are applicable pursuant to § 103(a)." *In re Schum,* 112 B.R. 159, 161 (Bankr.N.D.Tex.1990) (emphasis added). "This

Court accepts the tenet of statutory construction that, regardless of the inclusiveness of the general language of a statute, it does not apply or prevail over matters specifically dealt with in another part of the same enactment." *In re Chavez,* 117 B.R. 733, 734 (Bankr.S.D.Fla.1990) (construing sections 1322(b)(2) and 506(a) and (d)); *see Boullion v. Sapp (In re Boullion),* 123 B.R. 549, 550 (Bankr.W.D.Tex.1990) [hereinafter *In re Boullion*]; *In re Russell,* 93 B.R. 703, 705 (Bankr.D.N.D.1988); *In re Hynson,* 66 B.R. 246, 249-50 (Bankr.D.N.J.1986). To find that section 1322(b)(2) controls over section 506(a), the Court must find that the two sections are in conflict. *See Aeron Marine Shipping Co. v. United States,* 695 F.2d 567, 576 (D.C.Cir.1982). It is clear that a limited conflict exists, in that section 506 can be used to undermine the protection afforded by section 1322(b)(2) under the very narrow circumstances defined by that statute.[2] Because this limited conflict between the statutes exists, the bifurcation theory advanced by the Third, Ninth, and Tenth Circuits is not supported by the language of the section 1322(b)(2).

Second, the *Hougland* court's analysis requires "that § 1322(b)(2) applies only after the secured debt has been reduced to the fair market value of the property. In other words, § 1322(b)(2) 'kicks in' only to prevent any further modification of this secured claim. The problem with this

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[2] The *Hougland* court contended that sections 506(a) and 1322(b)(2) are not in conflict. *See In re Hougland,* 886 F.2d at 1184. The Court finds, however, that the plain terms of the two sections reveal an inescapable, although limited, conflict.

approach is that it renders § 1322(b)(2) essentially meaningless." *In re Hart*, 923 F.2d 1410, 1417 (10th Cir.1991) (Brorby, J., dissenting). It is a basic tenet of statutory construction that a statute should be interpreted so as not to render a part of it inoperative or superfluous. *See Rosado v. Wyman*, 397 U.S. 397, 90 S.Ct. 1207, 25 L.Ed.2d 442 (1970); *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir.1972); *Ensearch International Exploration, Inc. v. Attock Oil Co.*, 656 F.Supp. 1162, 1165 (N.D.Tex.1987). The bankruptcy court in *In re Schum* stressed this point in prohibiting a modification of the secured status of a claimant whose claim is secured only by the principal residence of the debtor. *See In re Schum*, 112 B.R. at 162; *see also In re Woodall*, 123 B.R. at 98 (stating that "using § 506(a) to bifurcate would make the intent of § 1322(b)(2) a nullity, and the Court believes that Congress enacted § 1322(b)(2) for a purpose").

Although the *Hougland* court purported to discern the plain meaning of section 1322(b)(2), it ignored the congressionally dictated definition of the term "claim", which is a "right to payment", whether secured or not. 11 U.S.C. § 101(5)[3]; *see In re Mitchell*, 125 B.R. 5, 6 (Bankr.D.N.H.1990) (quoting *In re Moran*, 121 B.R. 879, 882 (Bankr.E.D.Okla.1990) in finding that " 'in order to afford § 1322(b)(2) any relevant meaning, we must find

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[3] Although several courts refer to 11 U.S.C. § 101(4) as providing the Bankruptcy Code's definition of "claim," recent amendment of section 101 added a new section 101(3) (defining "federal depository institutions regulatory agency"), which resulted in the redesignation of section 101(4) as section 101(5). *See* 11 U.S.C.A. § 101, Historical and Statutory Notes (1979 & Supp.1991).

that the "claim" referred to in this section applies to the entire claim' " as defined by section 101(4) of the Bankruptcy Code and therefore that " 'this would include both the secured and unsecured portion of the creditor's claim.' "); *Bayless v. Crabtree ex rel. Adams*, 108 B.R. 299, 305 (Bankr.W.D.Okla.1989) (holding that "claim" under bankruptcy laws includes virtually all legal or equitable rights to payment and must be broadly construed). As the court in *In re Sauber* correctly observed, the "clearly focused concern [of section 1322(b)(2)] is with the rights of *holders* of residential real estate mortgages." *In re Sauber*, 115 B.R. at 199. Rather than following the *Hougland* court and reading the general provisions of section 506 into the more specific provisions of section 1322 in order to change the meaning of the word "claim," the courts finding that section 1322(b)(2) prohibits the type of bifurcation sought by the Nobelmans "believe[ ] that the statute means what it says. Congress meant to establish a special protected class of creditors in a Chapter 13 case under § 1322(b)(2). To read the statute other than literally, as many courts have done, is to permit inroads into a protection afforded a class of creditors by Congress." *In re Boullion*, 123 B.R. at 551.

Although the *Hougland* court did not look to legislative history to determine the proper interplay between section 506(a) and 1322(b)(2), the Third and Tenth Circuits did examine the historical context of those provisions. *See In re Hart*, 923 F.2d at 1412-13; *Wilson v. Commonwealth Mortgage Corp.*, 895 F.2d at 127-28. Put briefly, the legislative history shows that section 1322(b)(2) was a compromise between sharply contrasting proposals. So far as the precise issue presently before

the Court is concerned, the intent of Congress in passing section 1322(b)(2) is not clearly expressed in the legislative history, although there is no question that Congress intended to accord home mortgagees preferred treatment under the law. *See Id.* at 128 (finding that "it is clear that the anti-modification provision" was "inserted on behalf of the home mortgage industry"); *In re Hougland*, 886 F.2d at 1185 (stating that "Congress intended to benefit residential real estate lenders"). The Fifth Circuit's analysis of section 1322(b)(2)'s legislative history does indicate, however, that section 1322(b)(2) was intended to prohibit the type of bifurcation sought by the Nobelmans.

In *Grubbs v. Houston First American Savings Association*, the Fifth Circuit analyzed the legislative history of section 1322 at length and found that the curing of arrearages in Chapter 13 plans was not a "modification" under the terms of the statute and therefore was not prohibited by sections 1322(b)(2) and (b)(5).

> The final amendments to H.R. 8200 and S.B. 2266 (the latter being the Senate's amended version of the House bill), were accomplished by a series of agreed-upon floor amendments in both houses, by which differences between the two versions were reconciled and compromised. With regard to § 1322(b)(2), the Senate receded from its position that no "modification" was to be permitted of *any* mortgage secured by real estate; it instead agreed to a provision that modification was to be barred *only* as to a claim "secured only by a security interest in real property *that is the debtor's principal residence.*" This limited bar was apparently in response to perceptions, or to suggestions advanced in the legislative hearings that homemortgagor lenders,

> performing a valuable social service through their loans, needed special protection against modification thereof (*i.e.*, reducing installment payments, secured valuations, etc.).

Grubbs v. Houston First American Savings Ass'n, 730 F.2d 236, 246 (5th Cir.1984) (citation omitted).

In addition, "[i]t must also be remembered that the prior Bankruptcy Act did not allow Chapter 13 debtors to modify secured claims." *In re Mitchell*, 125 B.R. at 8. Because the legislative history of section 1322(b)(2) does not indicate any congressional intent to alter the status quo, "[t]his suggests Congress did not want to effect a change with respect to home mortgages." *Id.*

> I conclude that § 1322(b)(2) continued the prohibition on modifying the rights of holders of claims secured by real estate, but only with respect to real estate that constitutes the debtor's principal residence. If Congress had intended to change the manner in which a claim secured by a debtor's residence would be treated under the Code it would have specifically limited § 1322(b)(2) to claims secured pursuant to § 506. However, as Congress did not explicitly change the treatment of claims secured by a mortgage on a debtor's residence, I conclude that a continuity of treatment of such claims was intended.

In re Kaczmarczyk, 107 B.R. 200, 203 (Bankr.D.Neb.1989).

Following the interpretation of the intent of Congress in enacting section 1322(b)(2), the Court finds that applying section 506(a) to the secured claim at issue in this case would mean allowing a "modification" prohibited by the statute. "The proposed modification of the debt at issue

would have the effect of treating real property secured by only a lien on the debtor's principal residence in the same manner as any other property secured by a lien. Such treatment would frustrate the legislative intent of § 1322(b)(2)." *In re Schum,* 112 B.R. at 162. Furthermore, "bifurcation of § 1322(b)(2) claims would result in a windfall to debtors who would then repay only the value of their residence, and reap the benefit of their discharged 'unsecured' claim if property values rise." *In re Woodall,* 123 B.R. at 97-98. Such a use of section 506(a) to bifurcate claims into secured and unsecured claims would produce "a result contrary to the Bankruptcy Code's intended 'fresh start.' " *Id.* at 98.

The Court is aware of the conflicting decisions of courts in other jurisdictions. The plain language of section 1322(b)(2) and the Fifth Circuit's analysis in *Grubbs v. Houston First American Savings Association* convince the Court that a modification of the secured status of a claimant whose claim is secured only by the principal residence of the debtors is prohibited under the Bankruptcy Code. "To determine otherwise would be to vitiate any protection that § 1322(b)(2) is obviously intended to provide home mortgage lenders." *In re Moran,* 121 B.R. at 882. Accordingly, the ruling of the bankruptcy court is AFFIRMED.

The Nobelmans also argue that their requested bifurcation is allowed under section 1322(b)(2) because the deed of trust at issue here provides for a security interest in an undivided .67% interest in the common areas of the condominium complex, escrow funds, proceeds of hazard insurance, and rents, in addition to the residence itself. The Court finds this contention to be without merit. *See*

Equity Investment Co. v. Moreland (In re Moreland), 124 B.R. 921, 922 (Bankr.D.Conn.1991) (finding meritless an argument that because a mortgage extended to such things as rents, royalties, stock and fixtures the mortgagee's claim was not secured "only" by realty).

IV. Conclusion.

For the reasons stated above, the Order of the United States Bankruptcy Court for the Northern District of Texas, Dallas Division, entered March 12, 1991 is AFFIRMED.

SO ORDERED.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	§	
	§	CASE NO.
LEONARD and HARRIET NOBELMAN,	§	390-35116-HCA-13
	§	
Debtors	§	
	§	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The present dispute concerns the treatment of a creditor whose claim is secured by a lien on a debtor's principal residence under a Chapter 13 plan of reorganization.

The Court finds that this matter is a core proceeding under 28 U.S.C. § 157(a), (b)(2)(A) & (L). The following constitutes the Court's findings of Fact and Conclusions of Law pursuant to Federal Rule of Bankruptcy Procedure 7052.

FACTS

1. On June 21, 1984, Leonard and Harriet Nobelman (the "Debtors") executed a note in the amount of $68,250.00 payable to American Savings Bank, N.A. ("American"), secured by a purchase money Deed of Trust on the primary residence of the Debtors. Murray Mortgage Company ("Murray") is the duly authorized servicing agent of American.[1]

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[1] Murray filed an objection to confirmation of the Plan in this case. The Court shall refer to claim holder as "Murray."

2. On August 6, 1990, Debtors filed a voluntary petition for relief under Chapter 13 of the United States Bankruptcy Code.

3. On August 14, 1990, Murray filed its proof of claim for $71,265.04 which was later amended as a claim for $71,335.04.

4. Debtors filed their Chapter 13 Plan of Reorganization (the "Plan") on August 31, 1990, which was later modified. The Plan values the residence at $23,500.00 Debtors filed a Motion for Valuation along with the modifications to their Plan.

5. At confirmation, the Debtors offered the testimony of Leonard Nobleman, regarding the value of the property. No controverting evidence of the value was offered by any other parties.

6. The Plan proposes to make direct payments to Murray at the mortgage contract rate only up to scheduled value of the collateral. The balance of Murray's claim ($41,257.66) is treated as a general unsecured claim under the Plan, payable pari passu.

7. The unsecured creditors receive nothing under the Chapter 13 Plan.

8. The Debtors propose to cure the prepetition arrearage owed to Murray through their Plan.

9. Both Murray and the Standing Chapter 13 Trustee objected to the confirmation of the Plan on the grounds that, *inter alia*, the Plan purports to alter the lien holders rights prohibited by 11 U.S.C. § 1322(b)(2)(1989 Supp.).

CONCLUSIONS OF LAW

1. It appears to this Court that the secured creditor has no interest in rents or proceeds generated by the collateral inasmuch as no income is currently generated from the Debtors residence. Hence, the argument that Murray is secured by rents and outside the scope of § 1322(b)(2) is inapplicable to the present dispute.

2. A debtor's Chapter 13 plan of reorganization may "modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtors' principal residence . . . " § 1322(b)(2).

3. As this Court has previously ruled, § 1322(b)(2) of the United States Bankruptcy Code precludes a Chapter 13 debtor from modifying the rights of a creditor whose claim is secured only by an interest in the debtor's principal residence. *In re Schum*, 112 B.R. 159 (Bkrtcy. N.D. Tex. 1990) (*citing, In re Kaczmarczyk*, 107 B.R. 200 (Bkrtcy. Neb. 1989)).

4. The Plan impermissibly proposes to modify Murray's rights which are secured by the Debtor's residence. Specifically, the Plan seeks to bifurcate Murray's claim into secured and unsecured claims in violation of § 1322(b)(2). *See In re Schum, Id.*

Accordingly, confirmation of the Plan is **DENIED**. Counsel for the Standing Chapter 13 Trustee is requested to prepare an appropriate order, and submit same to the Court with copy to opposing counsel.

Signed this 13th day of February 1991.

/s/ Harold C. Abramson
Harold C. Abramson
United States Bankruptcy
Judge